IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 28

DAN B. SHIELDS and INTERSTATE COMMERCE COMMISSION,

Petitioners,

v.

THE UTAH IDAHO CENTRAL RAILROAD COMPANY,

Respondent.

MOTION OF THE RESPONDENT, THE UTAH IDAHO CENTRAL RAILROAD COMPANY, FOR LEAVE TO FILE SUPPLEMENTAL BRIEF, AND SUPPLEMENTAL BRIEF

J. H. DEVINE,
J. A. HOWELL,
NEIL R. OLMSTEAD,
Attorneys for Respondent.

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MOTION OF RESPONDENT FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Now comes The Utah Idaho Central Railroad Company, the respondent herein, and respectfully moves that this Honorable Court accept and consider the supplemental brief in the form annexed hereto and made a part hereof. This motion is made because, upon the argument of this case, the Chief Justice of this Honorable Court expressly inquired as to a question having a vital bearing upon the problem involved, viz., as to a definition of the term "interurban railroad", as that term is used by Congress in the Railway Labor Act.

Respectfully submitted,

J. H. DEVINE,
J. A. HOWELL,
NEIL R. OLMSTEAD,
Attorneys for Respondent.

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SUPPLEMENTAL BRIEF OF RESPONDENT

The single purpose of this supplemental brief is to answer the question put by the Chief Justice at the oral argument of the case, to wit, "What is the definition of the term 'interurban railroad' as that term is used by the Congress in exempting such railroads from the Railway Labor Act?"

The answer is: "An interurban railroad is one which, by reason of its physical characteristics, is enabled to offer to the public but one type of transportation service, namely, that which can be accomplished by short, light, rapidly moving trains, operated at frequent intervals of time and making frequent stops for the receiving and delivering of passengers and freight—a type of transportation service distinct and separate from that which other carriers in the

transportation field, as, for instance, ordinary steam railroads or motor truck lines, are capable of giving by reason of their physical characteristics."

It is conceded that in arriving at the definition of the term its derivation does not give us any aid, because practically all railroads, indeed all transportation facilities, are operated between cities. To arrive at its particular meaning as used by the public and by the Congress, therefore, the proposition must be considered in its historical aspect. Commencing at about the beginning of the century there developed, primarily by reason of the advances made in the electrical field, a new type of railroad, which was distinct and separate, in its physical characteristics, from those in existence, as well as in the character of the service it offered to the public, which for want of a better term was called interurban. True, as stated by Mr. Justice Roberts, speaking for this Court in the case of *United States* v. *Chicago, North Shore and Milwaukee Ry. Co.*, 288 U. S. 1, interurban railroads were, as a rule, at the outset primarily engaged in the transportation of passengers, but this was by no means universal, for almost from the beginning this new type of railroad was found by the public to be capable of carrying on a special kind of freight business which met a special need of the public. This may be described generally as a local service consisting in gathering or collecting the products of the territory served, for delivery either in their original state or when processed or transformed into manufactured products, to the trunk lines of railroad for transportation by them to the markets. With the ever-increasing need of rapid transportation of such products to the processing or manufacturing plants and thence to the markets, or, if they needed no processing or

manufacturing, direct to the markets, this service rendered by interurbans became increasingly important, and at the time respondent's line was constructed, the fact had become thoroughly established that such service was as much a part of the service to be rendered by interurbans as passenger service. At the present time the interurbans which do not furnish that type of service are negligible in number. Certainly those cities and towns which granted the respondent by franchises the right to operate over their streets, and in the franchises restricting the respondent in its operations to that of an "interurban railroad", had no conception that thereby they were restricting it to the carriage of passengers, else they would not have continuously ever since permitted it to carry freight along their streets.

The historical aspect of the situation is, of course, more fully set out in the Record at pages 79-82, 158-161; in respondent's original brief at pages 5-14; and in the brief of The American Transit Association, as *amicus curiae*, at pages 3-5.

There is no doubt that the public easily recognizes the two types of railroad as distinct and separate. If the average man living in the territory served by respondent's line were asked what transportation service there is between Ogden and Preston, he would unhesitatingly say "There is a steam railroad and an interurban." Indeed, he would be shocked beyond measure if his statement that respondent is an interurban was questioned, or if he was told that it is not, because its freight business is so extensive because he would know that it has always carried freight, and would also know of the industrial processing and manufacturing plants on its line to and from which such freight is carried, which plants constitute the locality's most important

industrial development. He would likewise know that such freight business is the primary freight business of the company, and while it carries some other freight, such other freight business is but incidental thereto. (See pages 29 and 30 of respondent's original brief.) True, he probably would not be able to give the reasons why respondent's operations in serving the public in the transportation field are different from those of a steam railroad, for he would not be concerned with causes, but only with results.

However, the mere fact alone that the respondent's line substantially paralleled the tracks of a steam road, except in its use of city streets, shows that it must have been conceived that it would perform a different service to the public else it would never have been built. The fact that the amount of freight it carries today or the revenue derived therefrom does not differ from what it carried when it first started operation demonstrates that the purpose to be served from the beginning was not merely the transportation of passengers, and that, if the respondent ever was an interurban, it still is, for neither its physical characteristics nor its operations have in any wise changed except that it has lost passenger business due to the increasing use of the privately-owned automobile (R. 138-139).

The purpose of the testimony introduced by respondent before the Commission and before the Court, and the thesis of our original brief, was to show that the differences which, as we have said, are well known to the public, in operation between an interurban railroad, using the respondent as an example of an interurban, and the steam railroads operating in the territory, and a steam railroad operating in part by electric power, are not merely accidental but are brought about by the differences in their

physical characteristics. In the case of the respondent they compel it to operate as it does, all of them being integrated so that all would have to be changed in order for it to operate the long heavy trains, either passenger or freight, operated upon steam railroads, because the change of any one characteristic would not suffice. Moreover, its line would have to be relocated so as to remove it from the city and town streets, which, within their corporate limits, it occupies to the extent of almost 100% of its line. (Respondent's original brief, pp. 15-34.)

It was suggested by the Chief Justice that a comprehensive definition of an interurban railroad was given by this Court in *Piedmont & Northern Railway Company* v. *I. C. C.*, 286 U. S. 299. It can not be denied that in that case the Court, speaking through Mr. Justice Roberts, referred to the fact that the railroad in question in that case was predominantly a freight-carrying road, but when the *North Shore* case, *supra*, came before this Court, it became necessary to limit the effect of the *Piedmont* case to the precise question which was before this Court in that case, namely, whether the Piedmont had to have from the Commission a certificate of convenience and necessity to construct what would have been a link in a trunk line railroad, and this Court held that it did, because the Congress had declared in the Transportation Act its policy to be that such competing roads with already existing roads should not be constructed with the result that what would otherwise be an interurban would be transformed into trunk lines, except where there was necessity therefor. In the *North Shore* case this Court held the railroad therein was an interurban, notwithstanding it was extensively engaged in freight business. (See respondent's original brief, pp.

39 and 63.) It is significant that the Interstate Commerce Commission in the later cases coming before it, and in which it attempted to say, in contravention of its previous holdings which recognized that a railroad did not cease to be an interurban because extensively engaged in the freight business, that what would otherwise be an interurban railroad may cease to be such because of the character of its freight business, has expressly repudiated the proposition that the predominance of freight revenue is in any sense a determining factor. *Texas Electric Railroad*, 208 I. C. C. 193, 202, the Commission said that an electric railway which is engaged in the general transportation of freight *"whether the revenue therefrom is greater or less than its passenger revenue*, which handles its freight in standard equipment similar to that used by the steam lines, a considerable portion of which is handled in interstate or foreign commerce, and which participates in joint rates with steam railroads for interstate shipments, has more of the characteristics of a commercial railroad operated by electric power than an interurban as that term is used in the exemption provision under consideration". (Italics ours.) The evidence in this case clearly shows that a part of a steam railroad operated by electric power has, except as to that, precisely the same characteristics as the steam portion and its operations are precisely the same. It can haul as long, heavy trains, both passenger and freight, as the steam portions (R. 103-105), which is not true of the respondent's line, which by reason of its physical characteristics, other than the mere character of power used, cannot, although its manner of using that power does so limit it. That part of a steam railroad which is electrified performs for that part of the territory served precisely the

same function as is performed by the steam portion for the territory served by it. Not so with a line like respondent, which performs an entirely separate and distinct function as to the carriage of both passengers and freight to that of the steam railroad operating in the same territory (Exhibit 4, R. 161 *et seq.*).

Now, our complaint is that the Congress, having used the term "interurban" without defining it, must be held to have used it in the popular sense which did not contemplate that either the extent of or the manner of handling the character of freight business is the factor which determines whether a railroad is or is not an interurban railroad, and that the Commission in deciding otherwise did so contrary to law.

Moreover, as we have shown in our original brief—if there were any doubt as to the popular meaning of the term—the Congress has clearly indicated its intention that the fact that a railroad was engaged "in the general transportation of freight" should not be the determining factor, for it has expressly stated that a railroad might be engaged in the general transportation of freight, and still be an interurban (Section 15a of Interstate Commerce Act, Section 77(m) of Bankruptcy Act). The Commission indeed so admits in the above-quoted language, but says the determining factor is rather how the freight is handled, that it is transported in standard equipment, interchanged with other roads, and that at least some of it moves in interstate or foreign commerce over joint routes and upon joint rates with which they have been established. Yet with as much emphasis as it has said that the fact that a railroad is engaged in the general transportation of freight is not controlling, the Congress has said that none of these facts is

controlling. It has required all carriers engaged in interstate commerce, including respondent, to establish joint routes and through rates with other carriers and to furnish the necessary hauling facilities for interchanged business (Paragraphs 3 and 4, Section 1 of the Interstate Commerce Act). It would not only be uneconomical, but absurd that the freight which is thus required to be interchanged should have to be carried in a different type of car and then changed into a standard car. Indeed the Congress in its latest use of the term "interurban", since the statute here in question was enacted, and since the decision in the *Piedmont* case, has not only said that a railroad may transport freight in standard equipment but may derive more than 50% of its revenue from that source and still be an interurban (Section 77(m) of the Bankruptcy Act).

It is, we submit, illogical to say that the character of a railroad is determined by the manner in which its freight is handled, because that depends, not upon the character of the railroad, but upon the character of the business of the shipper, for it is the shipper, not the railroad, that determines how and to whom his freight shall be shipped.

The Commission assumed, in determining respondent is not an interurban, that the Congress had left to its judgment whether a particular railroad is an interurban as it had repeatedly requested be done, and gave it authority to exempt only such as were in its judgment exempt, but the Congress did not do that. It specifically exempted all electric interurban railroads, leaving only to the Commission, in the first instance, to determine whether a particular railroad came within the meaning of that term as popularly understood and as it itself had defined it. The action taken by the Commission clearly shows it is its intention under

he Act to substitute its own judgment for that of the Congress, for in its determinations so far made under the Act, it has in every instance except one held that the electric railroad under consideration was not an interurban—that exception being the North Shore, which it reluctantly and only out of deference to this Court's decision as to it, held was an interurban. But now that the Railroad Retirement Board has requested the determination of the status of that railroad under the Railroad Retirement Act, the Commission has reopened the case under the Railway Labor Act. The result, then, will finally be, if the Commission has its way, that there will be no interurbans in the country, except possibly those few which are exclusively passenger-carrying roads. This is obviously not what the Congress intended, else it could easily have said so.

The fundamental purpose of the Congress to exempt, so far as practicable, the short line interurban railways from the scope of the centralized administration by the Interstate Commerce Commission at Washington, has been evidenced by the repeated insertion by the Congress in Federal statutes of the same exemption under consideration in this case. Broadly speaking, the whole congressional history is eloquent of the intention to protect just such carriers as this respondent from the necessity of coping with that type of centralized administration which was considered necessary for the great trunk line steam railroads. Reversal of the decisions below in the present case would be (we submit) to defeat the intent of the Congress in favor of an engrossing attitude on the part of a centralized administration. We do not say that the Congress lacks the power to take this step; nor do we say that the Congress is not the judge of whether the desir-

ability of central administration surmounts the obvious injustices flowing from the application of centralized bureaucratic power to small and remote localized industries such as this. What we do say, is that the history of the congressional statutes on the subject, when objectively and dispassionately weighed, shows that the opposite was the intent of the Congress in this case.

Congress has repeatedly, both before and after the enactment of the Railway Labor Act, reserved to itself the authority—in spite of the requests of the Commission that it do otherwise—to exempt all electric interurban railroads, or certain classes thereof, from laws relating to steam railroads which make up the national railroad system of the United States. In the Railway Labor Act it exempted them all, unless they were a part of one of the steam railroads which constituted a part of that national system. Obviously, when it sought on a national scale to regulate labor relations and conditions on the steam railroads which constituted the national system, it recognized that the same conditions of employment did not prevail on electric interurbans as on steam railroads, nor were the relations of the employers to their employees the same.

This is clearly shown by the record. On respondent's line the employees are home every night, instead of being absent therefrom several days at a time as on the steam lines, and this condition is typical of interurbans. The dangers encountered in their employment are not comparable. The employees of respondent are and have been for many years organized in a separate union, as is the case with interurbans throughout the country, so that there could be no collective bargaining by its employees through an agency national in scope on railroads as contemplated

the Act, nor could any labor disputes arising on respondent's line be settled by a body (The National Adjustment Board) composed equally of employers and employees representative of organizations "national in scope" as contemplated by the Act (§ 3, First, (a)).

Now, if the Commission is to be permitted to substitute its judgment as to what the law should be as to what is or is not an interurban for what it is popularly understood to be and fixed by the clear intendment of the Congress, and thus exercise its independent judgment as to what electric railways should be exempted from the Railway Labor Act, then different legislation from that which has been actually enacted would have to be enacted. That is why we say, as did the lower courts, that the Commission's determination is against law.

It is not disputed that the purpose of the Congress was, in permitting the reference to the Interstate Commerce Commission, to have the facts as to whether respondent comes within the Act determined by that body, because of its experience in such matters, but we do dispute that the Congress thereby evidenced any intention that it thereby delegated to the Commission authority for legislative determination of what railroads should, as a matter of law, be exempted from the Act, because what railroads should be exempted is fixed by the language it used.

Now, the problem which confronted the respondent, after the determination by the Commission and its adoption by the National Mediation Board and the issuance of the latter's order thereon, was how, if at all, that determination could be reviewed. It was necessary for respondent to review it if possible, because immediately thereafter there appeared upon the scene a representative of the

Brotherhood of Railroad Trainmen who persuaded the company's employees to quit the union to which they had theretofore belonged and with which the company had a contract, as it had had since 1917, and join his union. Then, as their representative, he presented to the company a contract and demanded the acceptance of a contract which is the standard contract governing employees on the steam trunk roads. Its acceptance would have been an additional expenditure of $35,000.00 per year (R. 119-138). The railroad was already being operated at a loss (R. 138). It could not stand such an increase in operating costs. Its life was at stake. So it determined to refuse to comply with the order of the Mediation Board. But it and its officers were subject to the cumulative penalties provided by the Act as a result of criminal prosecutions. The only review for the company possible was to ask the Court to restrain the bringing of such prosecutions, claiming that it was not subject to the Act, and if it were, the Act would be unconstitutional as to it. Then arose the question of what evidence should be introduced.

This Court had decided in the following cases:

Tap Line Cases, 234 U. S. 1;
United States v. *Idaho*, 298 U. S. 105;
North Shore Case, supra;
Piedmont Case, supra;
Crowell v. *Benson*, 285 U. S. 22;
St. Joseph Stockyards Co. v. *United States*, 298 U. S. 38;

that the Court in such a case would review the determination by the Commission, or other administrative officer or body, and the only difference of opinion among the mem-

bers of this Court was the extent thereof; whether the Court in determining the question would confine itself to an examination of the record before the Commission or whether new evidence could be introduced. The majority of this Court had taken the latter view, namely, that where, as here, there is involved a question of law, namely, what is the meaning of the term interurban as used in the Act, and a question of fact, namely, whether respondent is an interurban within the meaning of that term, the trial court and this court will determine both questions upon the evidence introduced before it. The majority of the Court, speaking through the Chief Justice, in *Crowell* v. *Benson*, *supra*, held that where the question arises as it did in that case whether the relationship of employer and employee existed and whether the injuries to the employee relied upon were upon the navigable waters of the United States, in other words, whether the claim came within the Act, were matters which the Court would determine *de novo*. So here, whether respondent is exempted from the Act, what Congress meant by the term "interurban" and whether respondent is such an interurban, must under that decision be determined *de novo*. So the respondent brought the exhibits which had been introduced before the Commission up to date and introduced them in the trial before the court. It introduced only one new exhibit, namely, one showing an additional limiting factor upon its operations which had theretofore been overlooked and which evidence was purely cumulative. (Exhibit 8, R. 86-88.) Then, in response to the claim of petitioners that the report of the Commission, which petitioners introduced in evidence, was binding upon the Court, respondent introduced in rebuttal all the evidence before the Commission to show that it was against law. It being admitted that the evidence before the Court and

the Commission was substantially the same, the ques[tion] as to the extent of the review, which has heretofore [been] the Court, need not be determined in this case. As [said] by Mr. Justice Brandeis in the case of *St. Joseph Stockyards Co. v. United States, supra*:

> "* * * where what purports to be a finding upon a fact is so involved with and dependent upon questions of law as to be in substance and effect a decision of the latter, the court will, in order to decide the legal question, examine the entire record, including the evidence if necessary, as it does in cases coming from the highest court of a State."

So examined, we submit the record shows that the Commission determined respondent's line of railroad, admittedly electric, not to be an interurban solely because it misconceived the meaning of that term as used in the Act exempting such railroads from it, and that upon the record both before the Commission and the Court, under the law and the facts respondent does not come within the Act.

Respectfully submitted,

J. H. DeVine,
J. A. Howell,
Neil R. Olmstead,
Counsel for Respondent.